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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-792

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, *et al.*,

Appellants,

v.

DOLORES DUBLINO, *et al.*,

Appellees,

No. 72-802

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, *et al.*,

Appellants,

v.

DOLORES DUBLINO, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

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OPINION BELOW

The opinion below is reported at 348 F. Supp. 290 (W.D.N.Y. 1972).

JURISDICTION

In setting this case for argument, this Court postponed the question of jurisdiction. ___ U.S. ___, 41 U.S.L.W. 3391 (January 15, 1972). Appellees (hereafter "Plaintiffs") agree with the State Defendants that the Court has jurisdiction of this Appeal under 28 U.S.C. §1253, providing for direct appeal from decisions of three-judge courts properly convened pursuant to 28 U.S.C. §2281. See Brief of State Defendants at 2-4. This is so where, as in this case, the decision appealed from is based on a statutory claim joined with a constitutional claim which merited the convening of the three-judge Court. See *Rosado v. Wyman*, 397 U.S. 397, 402-3 (1970); *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287-88 (1963); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

Plaintiffs prevailed on their constitutional claims insofar as those claims were based on the right to notice of hearing. See 348 F. Supp. at 299. The three-judge court below was properly convened and this Court has jurisdiction of the appeal pursuant to 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Article VI, clause 2 of the Constitution of the United States (the "Supremacy Clause") is set out in the Appendix to this brief.

New York Social Services Law §§131(4) (as amended by Chapters 102 and 298 §5 of the N.Y. Laws of 1971) and 350-k are set forth in the Brief for Appellants New York State Departments of Social Services and Labor and their Commissioners at pages 4-6 and A-3 through A-5 respectively.

During the course of this action and prior to the opinion and judgment below, N.Y. Soc. Serv. L. §131(4) was amended on three occasions. The text of N.Y. Soc. Serv. L. §131(4) as amended by Chapters 683, §1, 685, §1 and 941, §1 of the N.Y. Laws of 1972 is set out in the Appendix to this brief.

The following statutory provisions are also pertinent to a consideration of this case and are set out in the Appendix to this brief: Social Security Act §402(a)(10), 42 U.S.C. §602(a)(10); Social Security Act §§402(a)(19), 430 *et seq.*, as amended by Pub. L. 92-223, 85 Stat. 802, 42 U.S.C.A. §§602(a)(19), 630 *et seq.*; N.Y. Soc. Serv. L. §350-e, as amended by Chap. 941, §4, N.Y. Laws of 1972.

COUNTERSTATEMENT OF THE CASE

A. Introduction

On July 1, 1972, Plaintiffs, all recipients of public assistance in the State of New York, commenced this action against the New York State Department of Social Services (hereafter "DSS"), George K. Wyman, Commissioner of DSS,[1] New York State Department of Labor (hereafter "NYDOL"), Louis L. Levine, Industrial Commissioner (Appellants DSS, Lavine, NYDOL and Levine will hereafter be referred to as the "State Defendants"), Erie County Department of Social Services and its Commissioner George G. Sipprell,[2] to enjoin the implementation against them and others similarly situated of

[1]During the pendency of this action, George K. Wyman was succeeded in office by Abe Lavine.

[2]Onondaga County Department of Social Services and its Commissioner, John L. Lascaris, intervened as Defendants (hereafter referred to as the "Onondaga Defendants").

N.Y. Soc. Serv. L. §§131(4), 164, and 350-k (as amended by Chapters 101, 102 and 298, §5 of the New York Laws of 1971), and for declaratory relief. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1343. The claims of Plaintiffs were based on Article VI and the Thirteenth and Fourteenth Amendments to the United States Constitution, the Social Security Act and 42 U.S.C. §1983. The District Court held that Plaintiffs were entitled to relief from enforcement of the New York Rules against those members of the class who are applicants for or recipients of Aid to Families with Dependent Children, including the Unemployed Parent Category, and that other members of the class were entitled to notice of their hearing rights. The court declined to hold for Plaintiffs on other points.[3]

B. Statutory and Administrative Framework

1. *Aid to Families with Dependent Children and the Work Incentive Program*

Each state provides financial assistance to needy dependent children under the federal Aid to Families with Dependent Children ("AFDC") program. See *King v. Smith*, 392 U.S. 309, 311 (1968); 42 U.S.C. §§601 *et seq.* For the family unit to receive AFDC, the child must satisfy two basic federal requirements. The child must be: (1) needy, according to a standard of need established by the state and (2) deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of one parent, and living with a parent or other statutorily specified relative. 42

[3]Plaintiffs have appealed from the aspects of that decision that denied the requested relief. See No. 72-5939.

U.S.C. §606. In New York this program is designated "ADC."

Some states, including New York, participate in the federal Aid to Families with Dependent Children-Unemployed Parent Program ("AFDC-U"),[4] for which a needy child is eligible if deprived of parental support by reason of the unemployment of the father. See 42 U.S.C. §607(a). In New York this program is designated "ADC-U."

A major portion of the cost of both programs is reimbursed by the Federal Government if the state has a plan for distributing such grants which meets the standards established by the Social Security Act. The other conditions of eligibility for the two programs are set forth in the Social Security Act. See 42 U.S.C. §602(a). The Social Security Act provides that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. §602(a)(10).

In 1967, the Social Security Act was amended to provide that states participating in AFDC, or AFDC and AFDC-U, programs were required to include the Work Incentive Program ("WIN") in their state plans. 42 U.S.C. §§602(a)(19), 630 *et seq.* In 1971 the Social Security Act was again amended and WIN was made more comprehensive. Act of Dec. 14, 1971, Pub. L. 92-223, 85 Stat. 802 (hereafter referred to as "the 1971 Amendments").[5] The purpose of WIN, as expressed in the

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[4]Together, AFDC and AFDC-U will be hereafter referred to as "AFDC."

[5]The 1971 Amendments do not yet appear in the U.S. Code, but do appear in the 1973 Supplement to the U.S. Code Annotated ("U.S.C.A."). Consequently, all citations to the current provisions of WIN will be to sections of the U.S. Code Annotated as modified

statute, is to help the AFDC recipient acquire a "sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society." 42 U.S.C.A. §630. As the result of the 1971 Amendments all state plans must provide for the registration for pre-WIN services of all recipients not excluded by the Act [42 U.S.C.A. §602(a)(19)(A)] and for certification to WIN of all those ready for WIN [42 U.S.C.A. §602 (a)(19)(G)(ii)].

The United States Department of Labor ("USDOL")[6] evaluates each recipient registered to determine what services the recipient requires and to determine whether such recipient is ready for certification to WIN, 29 C.F.R. §56.5(b), (c) (37 Fed. Reg. 12206). United States Department of Health, Education and Welfare, Work Incentive Program Handbook (hereafter "HEW Handbook"), §§80.1, 80.4, 80.5.[7] The available services must include health, vocational rehabilitation, counseling, child care and other social and supportive services. 42 U.S.C.A.

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by the 1973 Supplement. Citations to other sections of the Social Security Act or to the provisions of WIN as originally enacted in 1967 will be to the U.S. Code.

[6] In most instances USDOL delegates its functions to its local state employment services which discharge those functions pursuant to regulations and instructions of USDOL. See United States Department of Labor, Manpower Administration Manual, Title 93, "Work Incentive Program Handbook" June, 1972 (hereafter "USDOL Handbook") §9353(2)(b). The version of this Handbook which appears as Exhibit 46 in the Record was revised to reflect the 1971 Amendments to WIN in June, 1972. Citations are to the revised version.

[7] The version of the HEW Handbook which appears as Exhibit 45 in the Record was revised to reflect the 1971 Amendments to WIN in September, 1972. Citations are to the revised version.

§602(a)(19)(G). Such services are provided by a "separate administrative unit" of the state department of social services ("DSS"). After the required services have been provided, the unit certifies the registrant to the USDOL as ready for WIN. See 42 U.S.C.A. §602(a)(19)(G).

Once certification occurs, WIN makes three types of work and training available: (1) employment in the regular economy; (2) training for work in the regular economy; and (3) publicly-financed "public service employment." 42 U.S.C.A. §§630, 633. An independent evaluation of the training and employment needs of each individual is required prior to placement in one of the categories. Exempted from registration for pre-WIN services are the following:

"(i) a child who is under age 16 or attending school full time;

"(ii) a person who is ill, incapacitated, or of advanced age;

"(iii) a person so remote from a work incentive project that his effective participation is precluded;

"(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

"(v) a mother or other relative of a child under the age of six who is caring for the child; or

"(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph)..." 42 U.S.C.A. §602(a)(19)(A).

These recipients are excluded from compulsory work because only registered recipients are certified [42 U.S.C.A. §602(a)(19)(G)] and only certified recipients are subjected to sanctions for refusal to participate [42 U.S.C. §602(a)(19)(F)].

Once the pre-WIN services have prepared the eligible recipient for WIN, the recipient *must* be certified to WIN. 42 U.S.C.A. §602(a)(19)(G). States are penalized by a reduction of federal assistance for failure to certify to the Secretary of Labor as being ready for WIN at least 15% of the average number of those registered each year. 42 U.S.C.A. §603(c).

The 1971 Amendments established the following priorities for the registration of WIN participants:

> "... first, unemployed fathers; second, mothers, whether or not required to register pursuant to section 602(a)(19)(A) of this title, who volunteer for participation under a work incentive program; third, other mothers, and pregnant women, registered pursuant to section 602(a)(19)(A) of this title, who are under 19 years of age; fourth, dependent children and relatives who have attained age 16 and who are not in school or engaged in work or manpower training; and fifth, all other individuals so certified to him." 42 U.S.C.A. §633(a).

These priorities were enacted, in part, to protect even registered mothers from compulsory certification until other categories had been certified. See Statement of Sen. Talmadge, 117 Cong. Rec. 20569 (Dec. 4, 1971). Similar priorities had been established by regulation prior to the 1971 Amendments. See 45 C.F.R. §220.35(a)(3) (1971 ed).

Even after certification, WIN provides for monetary training and work incentives [42 U.S.C.A. §634], provides increased grants to reflect increased expenses

incident to employment [42 U.S.C.A. §602(a)(19)(D)], and establishes orientation, basic education, training and counseling services for participants [42 U.S.C.A. §633(d)]. To insure that training will lead to meaningful jobs, the Secretary of Labor is required to establish regional "Labor Market Advisory Councils" to assess manpower needs, and training must be related to those needs. 42 U.S.C.A. §632(f).[8]

Congress established a number of procedural devices to protect applicants and recipients from erroneous imposition of WIN sanctions. A recipient is entitled to a fair hearing on whether he or she should be required to register for pre-WIN services. See 29 C.F.R. §57.1 (37 Fed. Reg. 14268); 45 C.F.R. §205.10. A second hearing on the issue of "good cause" for refusal to accept employment or training or otherwise participate after certification to WIN is also required. This hearing is provided by USDOL according to standards it has set. 42 U.S.C.A. §633(g); 29 C.F.R. §§57.0 *et seq.* (37 Fed. Reg. 14268). Even after a finding that there was not good cause, a recipient may avoid termination of AFDC assistance by accepting counseling for a period of sixty days [42 U.S.C.A. §602(a)(19)(F)], and in any case assistance is only suspended "if and for so long as" the recipient refuses to participate [42 U.S.C.A. §602(a)(19)(F)].

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[8]Congress in 1971 also sought to strengthen WIN by creating a special tax incentive for private employers who employ WIN participants. Revenue Act of 1971, Pub. L. 92-178, 85 Stat. 497, 26 U.S.C.A. (I.R.C. 1954) §§40, 50A, 50B (1973 Supp.).

2. *The New York Work Rules*

On July 1, 1971, chapters 101, 102 and 298, §5 of the New York Laws of 1971 became effective. Chapters 102 and 298, §5 amended N.Y. Soc. Serv. L. §131(4):

(1) to provide that "no assistance or care" shall be provided to any "employable" recipient of public assistance who fails "to accept employment in which he is able to engage";

(2) to establish a presumption of employability, every recipient to be considered "employable" unless rendered unable to work by mental or physical incapacity, advanced age, full-time participation in school (for minors), full-time participation in "approved" vocational training, or the need to provide full-time care for other members, including children, of the recipient's household for which such care is not otherwise available notwithstanding "diligent efforts" by the recipient and the social services department to locate such care;

(3) to require employable recipients, and recipients enrolled in "approved" vocational training programs (hereafter, "vocational trainee unemployables") to report in person to the Division of Employment (State Employment Service, hereafter "SES") of NYDOL, to obtain public assistance payments;

(4) to require employable recipients to obtain "at least semi-monthly" a certificate from SES stating that no employment in which they are able to engage is available;

(5) to include those participating in public works projects established pursuant to N.Y. Soc. Serv. L. §§164 and 350-k in the category of "unemployed employable recipients."

Chapter 101, §2 created a new section of the Social Services Law §350-k, which

(1) mandated the establishment of public works projects for employable recipients of AFDC;

(2) required the assignment of employable recipients of AFDC to such public works projects, to work in return for their assistance; and

(3) provided that recipients who refused to report to or satisfactorily participate in public works projects would be ineligible for AFDC.[9]

During the course of this action, several changes were made in the New York Work Rules by the state legislature. Thus Chapter 683, §1, N.Y. Laws of 1972 amended §131(4) to delete the requirement that vocational trainee unemployables report to SES to pick up checks. Chapter 685, §1, N.Y. Laws of 1972 amended §131(4) to provide for monthly payment of the shelter allowance portion of the grant. Chapter 941, §1, N.Y. Laws of 1972 amended §131(4) to provide that applicants for and recipients of AFDC be deemed employable "in accordance with the provisions of [N.Y. Soc. Serv. L.] §350-e" (which describes those the State requires to register for WIN) except that the requirements of §131(4) continue to apply to applicants for or recipients of AFDC "until such time as they are enrolled and participating in the Work Incentive Program."[10]

[9]Chapter 101 also amended N.Y. Soc. Serv. L. §164 to mandate creation of similar public works projects for recipients of public assistance other than AFDC recipients. N.Y. Soc. Serv. L. §§131(4), 164 and 350-k were referred to collectively below as the "New York Work Rules." This appeal is concerned only with the decision of the court below insofar as it enjoined application of the New York Work Rules to those members of the Plaintiff class who were recipients of AFDC. Therefore, Plaintiffs will hereafter refer to N.Y. Soc. Serv. L. §§131(4) and 350-k (the only sections pertinent to this appeal) as the "New York Work Rules."

[10]These provisions have not been implemented. See fn. 16, *infra* at pages 20-21.

Immediately prior to the filing of this action, and during the year between filing and judgment, the Defendants acted to implement the New York Work Rules. By a series of Administrative Letters to local social services agencies, DSS required them to examine case files in order to prepare a roster of employables [Administrative Letter 71 PWD-34 (May 13, 1971), A. 50],[11] created procedures and forms for referral of employables to SES and imposed extensive reporting requirements on local agencies [Administrative Letter 71 PWD-43 (June 9, 1971), A. 53]. Although DSS issued procedural directives for creation of public works projects for Home Relief recipients, no steps were taken to enforce the new §350-k.[12] By Bulletin Transmittal 71 MB-49, DSS transmitted to the local welfare departments amended regulations to implement the New York Work Rules, codified as 18 NYCRR §§385.1 *et seq.* (A. 117).[13]

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[11] Numbers in parentheses preceded by "A." refer to pages of the Appendix.

[12] DSS took no steps to implement §350-k, apparently because the United States Department of Health, Education and Welfare (hereafter, "HEW") by letter dated April 28, 1971 (Ex. 16) had indicated that such projects were not in conformity with federal requirements and would not be reimbursed. See opinion below, 348 F. Supp. at 295 n. 7.

[13] NYDOL promulgated internal regulations governing those aspects of the New York Work Rules administered by SES. See II NYSES Bureau of Procedure Manual §§17090 *et seq.* (attached as Exhibit to Answer of NYDOL and Levine to Plaintiffs' Interrogatories). DSS issued several other Administrative Letters concerning the New York Work Rules, all of which dealt with details of implementation. The basic policy pronouncements, however, are contained in DSS Administrative Letters 71 PWD-34 and 43 and in the regulations.

3. *Application of the New York Work Rules*

Application of the New York Work Rules to AFDC recipients resulted in many hardships. First, the requirement that recipients report to SES offices to obtain their checks, on pain of ineligibility for assistance for 30 days, erected a condition of eligibility which was often difficult if not impossible to satisfy. But for the issuance of temporary restraining orders, Virginia Michael, Clara Bornatimer, Charlotte Jimerson and Billy White would have been required to travel 22, 22, 18 and 30 miles, respectively, to receive their checks (Stipulations of Fact ["Stips."] ¶¶34, 47, 57 and 75). (Paragraphs of the Stipulations of Fact cited herein are set out beginning at A. 150.) Recipients such as Clara Bornatimer and Betty Glenn were told to report to SES even though there was no public transportation available (see Stips. ¶¶47 and 55). All recipients were required to pay the cost of their transportation which in the less densely populated areas could be substantial (see Stips. ¶ 105; A. 250). Yet lack of funds to meet such costs was not good cause for failure to report to SES (Stips, ¶ 122).

Recipients of AFDC with numerous children and no child care arrangements were classified employable and required to comply with the Work Rules (see, *e.g.*, Stips. ¶¶31, 32, 34, 35, 50, 55, 60, 82).

Recipients found employable were placed in a dilemma: they were forced to decide either to comply, often at great hardship, or not to comply and risk, if non-compliance were eventually found to be without good cause, a mandatory penalty of denial of assistance for thirty days (Stips. ¶ 119).

Until the Work Rules were amended,[14] the requirement that vocational trainee unemployables report to

[14] See *supra* p. 11.

SES resulted in disruption of studies and class attendance for those AFDC recipients enrolled in WIN and other training programs (see Stips. ¶¶31, 38, 48, 61). Moreover, the Work Rules were applied against recipients enrolled in educational programs which were not "approved" pursuant to the Work Rules, especially four year college programs (whether in liberal arts or leading to a specific vocational degree)(See Stips. ¶¶65, 72, 79, 80).[15] They often forced a choice between accepting any proferred employment or losing assistance.

SUMMARY OF ARGUMENT

The court below concluded that enforcement of the New York Work Rules must be enjoined because Congress has preempted state action in the area of compulsory work for recipients of AFDC and because those Rules imposed an additional condition of eligibility on such recipients in violation of 42 U.S.C. §602(a)(10). The court was correct on both grounds because:

(1) The New York Work Rules conflict with the federal WIN program in that they prevent the participation in WIN of those of whom Congress required participation, they apply to AFDC recipients whom Congress exempted from compulsory work requirements and they lead to benefit terminations through procedures other than those established by Congress. See *e.g. Perez v. Campbell*, 402 U.S. 637 (1971).

(2) Congress has acted to the exclusion of the states by adopting a comprehensive compulsory work program that applies to all AFDC recipients.

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[15] For instance, AFDC recipient Henrietta Smith, a college student studying education of the mentally retarded, was sent to a job as a "go-go" girl (see Stips. ¶72).

See *e.g., Graham v. Richardson*, 403 U.S. 365 (1971); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Charleston and Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915).

(3) The New York Work Rules violate 42 U.S.C. §602(a)(10) by imposing numerous conditions of eligibility (including requirements that recipients report to SES offices to pick up assistance checks, accept any employment they are capable of performing, make diligent efforts to obtain child care and, if found out of compliance, discharge a 30-day penalty before eligibility can be reestablished) on AFDC recipients beyond those imposed by the Social Security Act. See *e.g., Carleson v. Remillard*, 406 U.S. 598 (1972).

ARGUMENT

I.

THE NEW YORK WORK RULES ARE INVALID BECAUSE THEY CONFLICT WITH AND FRUSTRATE THE FEDERAL WORK INCENTIVE PROGRAM.

This Court has consistently adhered to the principle that the states must conform their Social Security Act programs to the requirements of the Act. See *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). Under that Act Congress has established WIN as the sole compulsory work and training program for AFDC recipients. New York has required that these same recipients accept referrals to work under a program which does not conform with the Act and, in

fact, directly conflicts with it. The court below assessed numerous conflicts between WIN and the New York Work Rules and correctly concluded that those Rules must yield to paramount federal law.

The first of the conflicts between the New York Work Rules and WIN results from the interference of the Work Rules with the comprehensive program which Congress has established to help the AFDC recipient achieve employability. Interference results because individuals registered for WIN, as they are required to be by federal law, are subject to the Work Rules and thus are prevented from receiving the services required by the Act, and certification as ready for work or training to WIN. Congress correctly recognized the futility of a program of compulsory work referrals that neglects the real social and manpower service needs of individual recipients of public assistance.

WIN, as enacted in 1967, required the preparation of an "employability plan" for each WIN participant [42 U.S.C. §633(b)], provided for an extensive program of testing, counseling, orientation, basic education, training in communications and employability skills, work experience, institutional training, on-the-job training, job development and special job placement and follow-up services [42 U.S.C. §633(d)], provided that "good cause" for a participant's refusal to accept employment or training be evaluated by the manpower specialists of the Department of Labor [42 U.S.C. §633(g)] and provided for a period of counseling prior to termination of assistance [42 U.S.C. §602(a)(19)(F)]. Through simultaneously enacted provisions Congress also provided child care and family planning services for WIN participants. 42 U.S.C. §602(a)(15)(B)(i).

In the 1971 amendments this comprehensive program was expanded. Even *before* "certification" to WIN a "Separate Administrative Unit" of the state welfare agency must provide services, including health, vocational rehabilitation, counseling, and child care, for registered recipients. 42 U.S.C.A. §602(a)(19)(G). Long before the question of actual "employability" arises, a wide range of services must be provided. The modified WIN enrollment process allows the Department of Labor to use its expertise in assessing the employment potential of registered recipients [42 U.S.C.A. §602 (a)(19)(A)], while the provision mandating the creation of Labor Market Advisory Councils insures training related to labor market needs [42 U.S.C.A. §633(b)(2)].

The New York Work Rules have no similar provisions. When they were enacted, no money was appropriated for training, counseling, child care, transportation or any other employment related services (Stips ¶ 105). Neither the WIN Units established by the Department of Labor in the SES nor the Separate Administrative Unit plays any role in Work Rules implementation. No employability plan is prepared for those subjected to the Work Rules (A. 217). There is no requirement that Work Rules jobs be suited to the individual's experience or training (A. 218). There is only an overriding determination to remove recipients from welfare and put them into any available work. See *infra* at pages 39-40.

Although the Social Security Act, even prior to the 1971 Amendments, required that *every* "appropriate" recipient be referred to WIN, and subsequent to those Amendments has required that all but specified recipients of AFDC register for pre-WIN services, the New York Work Rules apply to these same recipients. The State of New York circumvents the entire WIN scheme by

referring an AFDC recipient, whether or not that recipient should be registered for WIN, to employment, on pain of termination of assistance for 30 days, as long as that recipient is not already enrolled in WIN.

This conflict, implicit in the Work Rules as originally enacted, was made explicit by the 1972 New York legislature when it provided that:

> "Notwithstanding section three hundred fifty-e [the section of the N.Y. Social Services Law which provides for a WIN program] or any other provisions of this chapter, the provisions of this subdivision shall apply to applicants for or recipients of aid to dependent children *until such time as they are enrolled and participating in the Work Incentive Program.*" N.Y. Soc. Serv. L. §131(4), as amended, N.Y. Laws of 1972, Ch. 941 §1 (emphasis supplied).

While the individual recipient registered under WIN is considered only potentially "employable" (registration must be followed by services calculated to render registered recipients ready for employment or training), the same recipient pursuant to the Work Rules is considered presumptively "employable," and can be denied the mandatory WIN services entirely. A few examples of the operation of the conflict suffice:

(1) the referral to work under the Work Rules of a person receiving pre-WIN services conflicts with WIN;

(2) termination of assistance to a person for failure to accept a Work Rules referral while registered for WIN conflicts with WIN;

(3) termination of assistance under the Work Rules to one registered for WIN, for failure to report to SES to pick up the assistance check conflicts with WIN;

(4) termination of assistance to a mother under the Work Rules for failure to make diligent efforts to secure child care while she is registered for WIN (and, perhaps,

not "certified" because of the absence of child care) conflicts with WIN.

A second conflict results from the fact that the New York Work Rules operate to subject to compulsory work certain AFDC recipients whom Congress intended to exempt from such compulsion. By exempting from compulsory referral to WIN certain categories of AFDC recipients, Congress demonstrated its judgment that requiring work would be inappropriate for those recipients. Senator Long, who introduced the WIN legislation in 1967, stated:

> "The Senate committee feels work should not be required as a condition of drawing welfare payments as to certain people." 113 Cong. Rec. 32593 (1967).

The report of the Senate Finance Committee also confirms this intent:

> "To provide guidelines and to clarify the manner in which the program will operate, the committee bill sets forth a number of categories of individuals who would not be considered as 'appropriate' for referral to the Secretary of Labor for the work incentive program. *Persons described in those categories would not be placed in any work situation unless they chose to request employment or training.*" Sen. Rep. No. 744, 90th Cong. 1st Sess., at 2984 (Emphasis supplied).

Those who have been exempt from WIN from its inception, and who continue to be exempt under the 1971 Amendments, include children under age 16 or attending school full time, the ill and incapacitated and those of advanced age, those so remote from a WIN project that effective participation is precluded and those needed in the home because of the illness or incapacity of another member of the household. 42 U.S.C.

§602(a)(19)(A); 42 U.S.C.A. §602(a)(19)(A). Under the 1971 Amendments, additional exemptions were provided: mothers of children under six and other relatives caring for such children are now exempt from the registration requirements [see 42 U.S.C.A. §602(a)(19)(A)(v)] and, hence, from certification to WIN [42 U.S.C.A. §602(a)(19)(G)(ii)] and threat of grant termination [see 42 U.S.C.A. §602(a)(19)(F)]. Likewise mothers and other female caretakers of children in homes in which there is a father or other adult male relative (who is required to register and has not failed to do so and has not refused to participate in WIN without good cause) are now exempt from these requirements. 42 U.S.C.A. §602(a)(19)(A)(vi). Under the New York Work Rules, such mothers have not been exempted (see *e.g.* Stips. ¶¶31, 32, 34, 35, 50, 82). Similarly, the Work Rules exempt mothers caring for children only if a "diligent" search for alternative care is made and exempt only those of the ill and incapacitated whose afflictions prevent them from "performing services." See 18 N.Y.C.R.R. §385.1.[16]

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[16] Amendments to the statutory provisions of the Work Rules adopted, in part, the language of the 1971 Amendments to WIN. N.Y. Laws of 1972, Ch. 941, §1. However, since these provisions have not been implemented it is impossible to know to what extent the definition of "employability" in New York corresponds to the WIN definition of those who must register for pre-WIN services. In view of the fact that the section which alters the definition provides that "notwithstanding" that definition, N.Y. Soc. Serv. L. §131(4) shall still apply to AFDC applicants and recipients until they are "enrolled and participating" in WIN, it seems likely that persons who could not be compelled to participate in WIN could be subjected to the Work Rules. In fact, Defendants continue to assert their right to refer persons not subject to WIN registration. (*E.g.*, though the amendments enacted by the New York legislature in 1972 seem specifically to exempt from the new definition of

This conflict also appears in another guise. After WIN registration occurs, the provision of services and certification to WIN (both of which occur *before* referral to work) are accomplished in accordance with priorities that insure that unemployed fathers and volunteer mothers are certified before other mothers and children. See 42 U.S.C.A. §602(a)(19)(G); §633(a). Since no such priorities obtain under the New York Work Rules, the Rules result in the referral, under compulsion, of those who, in the judgment of Congress, should not be compelled to work so long as fathers and volunteers remain uncertified (See Stips ¶¶31, 32, 34, 35, 50, 82). This aspect of the rules amounts to a virtual repeal of federal legislation.

Finally this conflict is emphasized by the 1971 Amendments to WIN which compel uniform application of the WIN requirements to AFDC recipients. Senator Talmadge, author of these Amendments, stated:

> "Under present law, all 'appropriate' welfare recipients must be referred by the welfare agency to the Labor Department for participation in the work incentive program. Certain categories of persons are statutorily considered inappropriate. Persons may volunteer to participate in the work incentive program even if the State welfare agency finds them inappropriate for mandatory referral.
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> *"Another criticism of the program has been that the State application of those standards of 'appropriateness' for the program have resulted in widely differing rates of referrals and program participation. My amendment would eliminate this situation with a series of amendments . . . .*
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> * * * * *

"employable" those persons too remote from a WIN project [see N.Y. Laws of 1972 Ch. 941, §§1, 4], the State Defendants insist that they will refer such persons under the Work Rules. See Brief of State Defendants at 31-32.)

"At least 15 percent of the registrants in each State would be required to be prepared by the welfare agency for training and referred to the work incentive program each year; States failing to meet this percentage would be subject to a decrease in Federal matching funds for aid to families with dependent children . . . . " 117 Cong. Rec. 20569 (Dec. 4, 1971) (Emphasis supplied).

The italicized language is as emphatic a statement as is possible that states are not to be allowed to impede implementation of WIN by altering the federal standards.

A third conflict is found when the procedural safeguards provided by WIN are contrasted with those available under the New York Work Rules. Congress, alert to the possibilities of abuse inherent in programs of compulsory work, surrounded WIN with extensive procedural safeguards. The court below described them thus:

"Like the Work Rules, WIN is 'designed to help families and individuals to become self-supporting rather than dependent upon welfare checks,' see S.Rep. No. 1589, 87th Cong., 2d Sess. 7 (1962), but, unlike the Work Rules, WIN provides more elaborate procedural protections for the public assistance recipient. Under WIN, the recipient is entitled to a hearing, prior to referral, on the issue of appropriateness for referral. See Title 42, United States Code, Section 602(a)(4) and 45 C.F.R. §220.35(a)(15). A second hearing if needed, on the issue of good cause for refusal to accept employment or training after referral to WIN is also required. See Title 42 United States Code, Section 633(g) and 45 C.F.R. §220.35(a)(16). In the event of a finding that good cause is not present, a recipient may delay termination of assistance by accepting counseling for a period of sixty days. See

Title 42, United States Code, Section 602(a)(19)(F)." 348 F. Supp. at 296.[17]

This description of WIN procedural rights highlights three major differences in procedures under the two statutes:

(1) Under the Work Rules the hearing on "employability" can only occur in a fair hearing when the state initiates grant termination proceedings for failure to comply (see Stips. ¶119), or at a fair hearing requested by the recipient if he or she is able to comply and is complying. See affidavit of Barry Van Lare, quoted in 348 F. Supp. at 299. In WIN one is entitled to test the question of whether or not one should be registered, in a hearing not resulting in grant termination, but rather resulting in a decision that the recipient must register.

(2) Under the Work Rules one may assert "good cause" for refusal to accept a job in a fair hearing only after the state has initiated grant termination proceedings for failure to comply (see Stips. ¶¶119, 120). In WIN there is a second hearing on good cause for failure to participate, which again does not result in grant termination if the recipient loses the hearing and then elects to comply. This second hearing is conducted by USDOL.

(3) Under the Work Rules termination of assistance is the immediate consequence of failure to prevail in the

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[17] This discussion cites the statute and regulations prior to the 1971 Amendments. The current provisions for a hearing on the registration requirement are contained in 29 C.F.R. §57.1 (37 Fed. Reg. 14268) and 45 C.F.R. §205.10; the provisions for the hearing still provided by the Department of Labor on the issue of "good cause" for refusal to accept employment or training after certification to WIN are contained in 42 U.S.C.A. §633(g) and 29 C.F.R. §57.0 *et seq.* (37 Fed. Reg. 14268 *et seq.*); the requirement of 60 days of counseling prior to termination of assistance remains in 42 U.S.C.A. §602(a)(19)(F).

hearing (see Stips. ¶120). In WIN, sixty days of counseling, if accepted, precedes termination.

Yet a fourth major procedural difference is found in the fact that the Work Rules impose a penalty of thirty days of benefit ineligibility once a failure to comply is found [see Stips. ¶120; 18 N.Y.C.R.R. §385.7 (formerly §385.6, A. 126)][18] while in WIN ineligibility lasts only so long as there is a failure to comply [see 42 U.S.C.A. §602(a)(19)(F)].

This Court has consistently held that state rules that conflict with the provisions of the Social Security Act must yield. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). This principle has been applied by three district courts and one Court of Appeals to preclude the enforcement of state work rules against AFDC recipients. See *Woolfolk v. Brown*, 325 F. Supp. 1162 (E.D. Va. 1971), *aff'd per curiam*, 456 F.2d 652 (4th Cir.), *cert. denied*, ___ U.S. ___, 93 S.Ct. 112 (1972);[19] *Bueno v. Juras*, 349 F.

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[18] See *Aguayo v. Richardson*, ___ F.2d ___, Nos. 479, 508 (2d Cir. Jan. 18, 1973), Slip Opinion at 1591-1593, for a discussion of the problems raised by this mandatory penalty.

[19] The decision in *Woolfolk*, which held that conflicts with WIN rendered a state compulsory work rule for AFDC recipients invalid, was filed April 22, 1971. Eight months later Congress enacted the 1971 Amendments and altered WIN extensively to increase its comprehensiveness. See *supra* at page 17. By so doing, it implicitly adopted the *Woolfolk* holding. See *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1939); *Missouri v. Ross*, 299 U.S. 72 (1936); *Manhattan Properties v. Irving Trust Co.*, 291 U.S. 320 (1934).

Supp. 91 (D. Ore. 1972); *Jefferies v. Sugarman*, ___ F. Supp. ___, No. 71 Civ. 2060 (S.D. N.Y. July 11, 1972).

These holdings merely apply that long-standing body of law that holds that a state may not enact legislation that conflicts with federal statutes. See *e.g.*, *Perez v. Campbell*, 402 U.S. 637 (1971); *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941). In *Sola Electric Co., supra,* the Court said:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules." 317 U.S. 173, 176.

The New York Work Rules "set at naught" the standards for compulsory referral to work or training of AFDC recipients set forth in the Social Security Act and deny AFDC recipients the benefits of access to WIN.

Neither lack of intent to frustrate the effectiveness of WIN nor the existence of an independent policy rationale for the Work Rules can justify these conflicts:

> "We can no longer adhere to the aberrational doctrine of *Kesler* [*v. Department of Public Safety*, 369 U.S. 153 (1962)] and *Reitz* [*v. Mealey*, 314 U.S. 33 (1941)] that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration .... Thus we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that *any state legislation which frustrates the full effectiveness of federal law is rendered invalid by*

the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) (Emphasis supplied).

It should be obvious that the full effectiveness of federal law is frustrated by a state program that circumvents the services offered in a federal program, results in termination of assistance to those Congress exempted from such terminations and accomplishes such terminations pursuant to procedures vastly different from those established by Congress.

In the same case this Court restated the test thus:

> "[I]n the final analysis, our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, (1941). Since *Hines* the Court has frequently adhered to this articulation of the meaning of the Supremacy Clause [citations omitted]." *Perez v. Campbell*, 402 U.S. 637, 649 (1971).

The many conflicts between the provisions of WIN and the New York Work Rules and the frustration of federal purpose inherent in the circumvention of WIN services, manifestly fall within this rule.

Nor is it necessary that Congress expressly prohibit state enactments for the rule prohibiting state law conflicts with federal law to apply. If conflict with or frustration of a federal statute is the effect of a state statute, state law must yield. *Savage v. Jones*, 225 U.S. 501, 533 (1912).

Defendants seek support in cases that deal with alleged conflicts between federal and state statutes, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S.

440 (1960); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). Brief of State Defendants at 24-28. In each of those cases the Court specifically found that no conflict existed. Such a conclusion would be impossible here. Where the conflicts are clear, the conflicting state laws are necessarily invalid.

In *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), a case in which this Court declined to conclude that "... the purpose of the federal statute would *to some extent* be frustrated by the state statute in question...." (372 U.S. 714, 722) (Emphasis supplied), it was said:

> "It is not contended, however, that the Colorado statute is in direct conflict with federal law [citing *McDermott v. Wisconsin*, 228 U.S. 115 (1913)], that it denies rights granted by Congress [citing *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956)], or that it stands as an obstacle to the full effectiveness of a federal statute [citing *Hill v. Florida*, 325 U.S. 538 (1945); *Hines v. Davidowitz*, 312 U.S. 52 (1941)]." 372 U.S. 714, 722. See also *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

The New York Work Rules, on the contrary, are in direct conflict with WIN, deny rights granted by WIN and stand as an obstacle to the full effectiveness of WIN.

II.

THE NEW YORK WORK RULES ARE INVALID BECAUSE THEY OPERATE IN A FIELD OCCUPIED BY FEDERAL LEGISLATION.

Even if direct conflict and frustration of WIN were not the result of the New York Work Rules, those Rules must fall under the principle that where Congress has acted with intent to regulate exclusively, the states may not

act. See, *e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926); *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915); *Woolfolk v. Brown*, 456 F.2d 652, 654 (4th Cir.), *cert. denied*, ___ U.S. ___, 93 S.Ct. 112 (1972). In *Varnville Furniture Co.*, Justice Holmes stated the rule applicable to such cases:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. . . . " 237 U.S. at 604 [citations omitted].

Here New York has gone farther than Congress where Congress has already taken the area in hand.

The court below concluded that " . . . WIN preempts the Work Rules Program." 348 F. Supp. at 297. The Defendants, repeatedly characterizing Plaintiffs' arguments on this point as urging pre-emption of the entire area of social welfare, miss the court's point. The court concluded that the area of compulsory work for federal welfare recipients has been so comprehensively regulated by Congress that the states may not act in this field. 348 F. Supp. at 297. The court was correct for two reasons: (1) Congress established WIN as the federal work program for *all* AFDC recipients; (2) the WIN program is a program, designed to result in employability, which is so comprehensive that it leaves no room for the operation of other programs.

Before the 1971 Amendments, 42 U.S.C. §602(a)(19)(A) required all recipients to be classified as appropriate or inappropriate; the appropriate had to be referred, the inappropriate could volunteer—only those for whose welfare (or for whose families' welfare) participation would be inimical could not participate and it was clear

that they could not participate. Since the 1971 Amendments, all recipients must register for pre-WIN employment services unless they come within a category excluded by Congress. Those registered must then be certified to the Secretary of Labor after they have received services which render them ready for WIN. In short, the WIN legislation is addressed to all AFDC recipients, leaving no employable recipients to be subject to state work rules. The legislative history in the Senate establishes that WIN was designed to provide for all AFDC recipients; the appropriate must participate, while the inappropriate may participate if they wish. *Supra*, at page 19. The structure of the 1971 Amendments establishes that, beyond this, WIN, through its service provisions, is to reach out and assist even those recipients who would otherwise be unemployable.

Further evidence of this intent is found in the Report of the House Ways and Means Committee on the WIN legislation of 1967:

> "Under your committee's bill, States would be required to develop a program *for each appropriate* relative and dependent child which would assure, to the maximum extent possible, that each individual would enter the labor force, *in order to become self-sufficient*. To accomplish this, the States would have to assure that *each* adult in the family and each child over age 16 who is not attending school is given, when appropriate, employment counseling, testing, and job training." H.R. Rep. No. 544, 90th Cong., 1st Sess. at 16 (1967) (Emphasis supplied).

And to similar effect:

> "*Every adult member and child* over 16 not attending school for whom it was determined that work or training is appropriate would be required to participate. . . . " *Id.* at 16 (Emphasis supplied).

"The committee is recommending the enactment of a series of amendments.... These changes are–(1) A requirement that all States establish a program *for each appropriate* AFDC adult and older child...." *Id.* at 96 (Emphasis supplied).

"Your committee intends that a proper evaluation be made of the situation of *all mothers* to ascertain the extent to which appropriate child-care arrangements should be made available...." *Id.* at 103 (Emphasis supplied).

In 1971, the intent to compel the states to apply WIN to all recipients was reiterated when Congress imposed a penalty on the states for failure to certify to WIN annually at least 15% of those registered. See 42 U.S.C.A. §603(c). Another indication of this renewed intent is the fact that Congress when it enacted WIN in 1971 also enacted, in the Revenue Act of 1971, a tax credit for private employers of persons referred by WIN. Pub. L. 92-178, 85 Stat. 497, 26 U.S.C.A. (I.R.C. 1954) §§40, 50A, 50B (1973 Supp.). Had Congress envisioned referral of AFDC recipients to employment under state programs, it need not have limited the tax credit to employers of WIN participants.

Secondly, the services established by WIN are so comprehensive that it is hard to imagine that Congress would allow the states to ignore it at will. See *supra* at 16-18. There is no need to repeat here the elaborate detail of that program. As the Fourth Circuit stated in *Woolfolk v. Brown*, 456 F.2d 652 (4th Cir. 1972):

"...[W]e agree with the district court that by adoption of the Work Incentive Program Congress intended to preempt work rules for those in the federally assisted AFDC category since

> 'The thrust of the congressional approach—comprehensive regulation of the relation between the state and the beneficiary, a full range of programs designed to be of substantial permanent benefit to the individual, specificity as to those activities which the recipient must undertake lest sanctions be imposed, and limitation of sanctions to particular classes of recipients—is inconsistent with the continued application, as in these cases, of a state work rule which attempts to relieve the burden of welfare costs and place the recipient in employment in an imprecise and summary fashion. *Woolfolk v. Brown*, 325 F. Supp. 1162 at 1170 (E.D. Va. 1971).' " 456 F.2d at 654-55.

To rebut the overwhelming evidence of preemptive intent found in the language of the statute and its legislative history, the Defendants point to the fact that Congress envisioned the implementation of WIN in less than all social services districts. See Brief of State Defendants at 32, 37-38. Defendants also urge that Congress intended to allow WIN to be supplemented by state efforts. See Brief of State Defendants at 39.

As to the former, Congress did not intend that AFDC recipients in districts without WIN programs would have no access to WIN. Rather, Congress required establishment of WIN in districts having a significant number of AFDC recipients over 16 years of age and further required the Secretary of Labor to use his best efforts to provide access to WIN to those residing in other districts. 42 U.S.C.A. §632(a). (New York State WIN programs in fact operate in districts accounting for at least 90% of the state AFDC population. Brief of State Defendants at 18.) Rather than exempting from registration all those who reside in the non-WIN districts, Congress exempted only

those who are "so remote from a work incentive project that [their] effective participation is precluded." 42 U.S.C.A. §602(a)(19)(A)(iii). The District Court in *Woolfolk v. Brown, supra*, correctly interpreted these provisions to require:

> "... a specific, individual finding by the welfare authorities that a given individual is inappropriate by reason of his location rather than the application of a general rule covering all in a certain area. Indeed the provision would seem to allow a finding that a resident of an area containing a WIN program was nonetheless too distant from it for mandatory referral, and it would be strange to give the language a different construction, calling for other than case-by-case consideration, in another context." *Woolfolk v. Brown*, 325 F. Supp. 1162, 1175 (E.D. Va. 1971).

In other words distance, like other factors, can render a recipient unable to participate.

Perhaps the Defendants have emphasized the problem in non-WIN areas because the Work Rules' effective frustration of federal purpose in WIN areas is so apparent. But analysis of the WIN scheme makes clear the intent of Congress to exempt from WIN, *and therefore from compulsory referral to work* (see *supra*, at page 8), those too distant from available services.[20] This reading is

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[20] Although the State Defendants have strenuously argued for the need of the State to be permitted to refer AFDC recipients in non-WIN areas, the 1972 legislature, perhaps in recognition of the problems inherent in setting up a program of compulsory work in sparsely populated areas, seems to have exempted from the Work Rules' operation those who are so remote from a WIN program that they cannot participate. See N.Y. Soc. Serv. L. §131(4), as amended N.Y. Laws of 1972, Ch. 941, §§1, 4.

consistent with the overall Congressional approach, which is that compulsory referral absent needed services is not to be sanctioned.

As to their second point, Defendants argue that the New York program is an effective supplement to WIN for those for whom WIN is not available. Yet the "effectiveness" of the New York program is questionable at best. Congress obviously placed more emphasis on training and services than did New York. The wisdom of this Congressional judgment is apparent when the effectiveness of WIN is compared to that of the New York Work Rules. A comparison of job placements demonstrates that WIN placements were generally higher quality placements than were Work Rules placements.[21]

[21] Even before it was amended effective July 1, 1971, N.Y. Soc. Serv. L. §131(4) provided for referral of public assistance recipients to jobs outside WIN. That statute was applied to only a fraction of the recipients later subjected to the New York Work Rules, yet SES was unable to place even those recipients in jobs. See NYDOL, "Employment Service Activities for Welfare Clients New York State, 1968-1970", at 6-7 (Ex. 34). NYDOL compared the nature of job placements in WIN with those under §131(4) in the following terms:

> "The largest number of WIN placements—33 per cent of the total—was made in clerical and sales jobs. Service occupations accounted for 25 per cent of all placements, and professional, technical and managerial jobs, 14 per cent. This latter figure for professional, technical and managerial jobs is more than double the 1969 placement figure of 5.7 per cent. This contrasts with 1970 placements of clients referred to jobs under Section 131.4 of the Social Services Law in 1970—only 2.1 per cent in professional and managerial occupations and 12 per cent in clerical and sales jobs.
>
> "WIN enrollees also earned higher rates of pay than other social services clients. Hourly earnings of WIN enrollees have risen since 1969. There may be several reasons for this: (1) higher state and federally-mandated minimum wage rates; (2) higher pay rates in general and (3) more frequent placement in high-paying professional, technical and managerial jobs.

Likewise, a large percentage of the jobs in which recipients were placed under the Work Rules proved to be temporary: over two thirds of those placed were no longer employed after three months; almost one third were separated from employment within the first week, and an additional one fifth had been separated by the end of the fourth week following placement. Ex. 47 (*Joint Study*) at 28-31. No doubt many of those separated return to welfare.

As to the availability of WIN openings, the State Defendants compare WIN and the New York Work Rules on the basis of statistics which are difficult to evaluate because they are unsupported by any reference either to the record below or to any other available source. See generally Brief of State Defendants at 38. The State

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"On December 31, 1969, only 9.5 per cent of employed WIN enrollees were earning $3.00 or more per hour. In contrast, during the July-December 1970 period, 9.8 per cent earned $3.00-$3.49 per hour, 4.3 per cent earned $3.50-$3.99 an hour, and 3.2 per cent of WIN participants placed in jobs had earnings of $4.00 or more. Thus, a total of 17.3 per cent were earning $3.00 or more an hour, compared with only 6 per cent of those placed under the Section 131.4 program. An even greater percentage of the New York City WIN enrollees were in the higher earning brackets.

"It is apparent that the WIN program is lifting some of its participants out of the lower-level, frequently irregular jobs in favor of better-paying, steadier work. The Employment Service is able to achieve this through special techniques and intensive teamwork." Ex. 34 at 17.

It is not surprising that pursuant to the expanded compulsory work program created by the New York Work Rules in 1971, §131(4) job placements still compared most unfavorably with WIN. [Figures for referrals under the Work Rules are from HEW, USDOL, NYDOL, DSS "Study of Selected Aspects of the 1971 New York State Legislative Provisions on Public Assistance Employables" (March, 1972), Ex. 47, Table 11 at 27 (hereafter, "*Joint Study*"); WIN Statistics are from Ex. 34, Table 6 at 18]:

Defendants compare the number of AFDC recipients who entered WIN in 1971 with the number of "referrals" under the Work Rules. Brief of State Defendants at 17. This comparison is meaningless because: (a) a large proportion of those "referred" under the Work Rules were not AFDC recipients (while WIN only applies to AFDC recipients),[22] and (b) a single recipient might have

Occupational Category	Percentage Placements under §131(4), July-October 1971	Percentage Placements of WIN Enrollees July-Dec., 1970
Professional, Technical & Managerial	1.5%	13.8%
Clerical & Sales	15.0%	33.4%
Domestic & other service	29.2%	25.1%
Farming, Fishery & Forestry	-	0.7%
Processing	7.7%	1.5%
Machine Trades	5.6%	4.5%
Bench Work	11.4%	4.4%
Structural Work	7.7%	5.1%
Motor Freight & Transportation	7.1%	-
Packaging Materials Handling	12.3%	-
Miscellaneous	2.5%	11.5%

[22] The State Defendants declined to provide state-wide statistics indicating the proportion of AFDC recipients subjected to the Work Rules (A. 266). However, in Erie County approximately one half of those required to pick up their welfare checks at SES were in the Home Relief category (A. 319).

been "referred" on more than one occasion. (That this frequently occurred is evidenced by the small proportion of referrals resulting in placements and by the short duration of Work Rules jobs.) In light of the job *placement* figures under the Work Rules, this statistic merely indicates that the State Defendants were sending recipients on futile quests for non-existent jobs (Stips. ¶¶106, 108, 110).

To support the "supplementary" effect of the Work Rules, Defendants next argue, again without citation, that the impact of WIN is relatively small when compared with the number of "employable" AFDC recipients in New York State. Brief of State Defendants at 38; Brief of Onondaga Defendants at 22. Yet 67% of those who were found employable under the New York Work Rules who declared themselves unemployable in November 1971, the fifth month of implementation of the program, were eventually found to have been incorrectly referred. See 348 F. Supp. at 296 fn. 10; Ex. 47 (*Joint Study*) at 19. And there is evidence in the record that not all WIN openings were being utilized by the State (A. 228). Compare Brief of State of California, *amicus curiae* at 6. Moreover, although again the asserted figures are unsupported, even the State Defendants' statistics indicate that WIN will have 63,000 openings for an estimated 75,000 registered recipients potentially certifiable to WIN. Brief of State Defendants at 17-18. Since not all registered recipients will be ready for certification immediately and since WIN in the past has had a 100% annual turnover rate (i.e., was able to service twice as many recipients per year as openings) (Brief of State Defendants at 17), all currently registered recipients who are ready for certification can presumably be served by WIN within one year.

The statistics hardly indicate that Congress has created a program which needs supplementation to serve the employment needs of AFDC recipients. Congress has acted comprehensively; that it has acted to the exclusion of the states is the inevitable conclusion.

III.

THE NEW YORK WORK RULES ESTABLISH ADDITIONAL CONDITIONS OF ELIGIBILITY IN VIOLATION OF THE REQUIREMENTS OF 42 U.S.C. §602(a)(10).

An alternative ground on which the decision of the court below rested was that the New York Work Rules, by denying assistance to those meeting the standards for eligibility established by the Social Security Act, violate the requirement of 42 U.S.C. §602(a)(10) that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 348 F. Supp. at 295. In so holding, the court was correctly applying the principle repeatedly articulated by this Court that "a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." *Townsend v. Swank*, 404 U.S. 282, 286 (1971) (exclusion of otherwise eligible "dependent children" attending colleges or universities invalid). See also *Carleson v. Remillard*, 406 U.S. 598 (1972); (exclusion of families in which the parent's "continued absence" from the home was due to military service invalid); *King v. Smith*, 392 U.S. 309 (1968) ("man in the house" rule, by which AFDC was denied to otherwise eligible families if the mother cohabitated with a man, invalid).

Similarly, New York has established a condition of eligibility not contained in the Social Security Act: compliance with the provisions of the New York Work Rules. The New York Work Rules provide:

> "No assistance or care shall be given to an employable person who has not registered with the nearest local employment agency of the department of labor or has refused to accept employment in which he is able to engage." N.Y. Soc. Serv. L. §131(4).

Subsumed under this general eligibility condition are a variety of obligations, noncompliance with any one of which results in a mandatory denial or termination of assistance. These eligibility conditions are applied to all "employable" AFDC applicants or recipients, whether or not they are eligible for or registered for WIN:

(a) "Employable" AFDC recipients must report in person semi-monthly to SES offices to obtain their public assistance checks. N.Y. Soc. Serv. L. §131(4).

(b) "Employable" applicants for and recipients of AFDC must report to any job interview to which they are referred. N.Y. Soc. Serv. L. §131(4).

(c) "Employable" applicants for and recipients of AFDC must report to SES the results of any referral to employment. N.Y. Soc. Serv. L. §131(4).

(d) "Employable" applicants for and recipients of AFDC who are mothers must make "diligent efforts" to secure child care. N.Y. Soc. Serv. L. §131(4); see Dep. of Edward Phillips at 64-66 (A. 247-248).

(e) "Employable" applicants for and recipients of AFDC must accept referral to and participate in

public works projects established pursuant to N.Y. Soc. Serv. L. §350-k.[23] N.Y. Soc. Serv. L. §131(4).

(f) No applicant for or recipient of AFDC may terminate employment or reduce earning capacity "without good cause." N.Y. Soc. Serv. L. §131(10); 18 N.Y.C.R.R. §385.7 (formerly §385.6, A. 126).

(g) No applicant for AFDC is eligible for assistance if within thirty days of application, AFDC assistance to the applicant was denied or terminated for failure to comply with the New York Work Rules. 18 N.Y.C.R.R. §385.7 (formerly §385.6, A. 126).

The operation of the Work Rules as an additional eligibility condition is particularly apparent in the case of the otherwise eligible applicants denied AFDC at the threshold for a failure to comply with some aspect of the Rules, and those who are ineligible for AFDC during a thirty day penalty period imposed under the Rules.

These added conditions of eligibility are not merely theoretical. Until the issuance of an injunction by the court below, they were applied to terminate or deny AFDC assistance to thousands of otherwise eligible recipients. A local administrator praised the program in the following terms:

"Last month, the weekend of October 5, we closed 100 cases. I haven't really gotten the closing codes for all these cases. I would say 24 of these cases were closed because of the refusal to comply with departmental policy and 15 were closed because of refusal to register or seek employment. I would think that the employment section is having a greater impact on the rate of closing. . . . we are closing a very great proportion of cases on the basis

[23]This requirement has not been enforced though the statute remains on the books. See footnote 12, *supra* at p. 12.

of failure to comply on the employment procedures." Quoted in *Report of the Subcommittee on Welfare Reform of the New York State Temporary Commission to Revise the Social Services Law* (Ex. 43), at 4-5.

In addition, the Work Rules operated to deny or terminate many more recipients than were placed in jobs or training (See Stips. ¶¶106-111).[24]

In *Townsend v. Swank*, this Court declared that "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history. . . ," state eligibility standards which go beyond those established by the Social Security Act are invalid. 404 U.S. at 286.

The Defendants have not met the burden of showing that any of the conditions of eligibility imposed by the New York Work Rules are authorized by the Social Security Act; moreover, these conditions of eligibility are in direct conflict with the provisions of the Social Security Act.

The Social Security Act, as modified by the 1971 Amendments, requires that every individual not excluded by the statute must register for pre-WIN services "as a condition of eligibility." 42 U.S.C.A. §602(a)(19)(A). This provision, and the further requirements for satisfactory participation in WIN of those registered and

[24] The statistics contained in the Stipulations of Fact are for both AFDC recipients and recipients of other forms of public assistance. The State Defendants maintained throughout this litigation that statistics by category of public assistance were unavailable. Presumably, the ratio of those AFDC applicants or recipients placed to those AFDC applicants or recipients upon whom sanctions were imposed would roughly correspond to the ratio in the "employable" population as a whole. See also discussion *supra*, at pages 33-36.

certified, are the *only* work-related *eligibility requirements* imposed on AFDC recipients. It should be clear that those required to register for WIN have satisfied the federal standard of eligibility once they register, thus making themselves available for certification to WIN.

It is equally apparent that Congress did not intend that those for whom registration for WIN is *not* a condition of eligibility under 42 U.S.C.A. §602(a)(19)(A) (including mothers and other caretakers of children under 6, and those recipients who are "so remote from a work incentive project that [their] effective participation is precluded") would be required to register at SES and accept referrals to jobs under pain of termination of assistance. Congress intended those it exempted from required participation in WIN to be exempt from any compulsory work requirement. Thus Senator Long, who introduced and explained the 1967 bill creating WIN, stated:

> "The Senate Committee feels work should not be required as a condition of drawing welfare payments as to certain people. *We spell out those people we think should not be required to go to work.*" 113 Cong. Rec. 32593 (1967) (emphasis supplied).

The legislative history, far from evidencing "congressional authorization" for eligibility conditions such as the New York Work Rules, see *Townsend v. Swank, supra*, indicates that precisely the opposite result was intended. This congressional purpose, implicit in the 1967 legislation, was made explicit in the 1971 Amendments when Congress, presumably aware of the *King-Townsend* line of cases, made registration for and participation in WIN a "condition of eligibility" for all but specified AFDC recipients. 42 U.S.C.A. §602(a)(19)(A). The 1971 Amendments were intended to remedy inconsistent

applications of this condition of eligibility by the states. See statement of Senator Talmadge 117 Cong. Rec. 20569 (Dec. 4, 1971) set out *supra* at pages 21-22.

Defendants seek to establish that various other provisions of the Social Security Act authorize the conditions of eligibility created by the Work Rules. The State Defendants insist that 42 U.S.C. §602(a)(8) authorizes the termination of assistance, for 30 days, to any person who has reduced earning capacity, quit a job, or refused employment offered through a state employment service. Brief of State Defendants at 22. However, the District Court correctly read the statute as merely authorizing the state not to apply the income disregard provided by the Act. See 348 F. Supp. at 295. This is so obvious from the language of the statute that it is difficult to understand why the State continues to rely on this point. The Onondaga Defendants recognize the District Court's reading as being correct, but complain that the sanction created by Congress is insufficiently harsh. Brief of Onondaga Defendants, at 18.

The Onondaga Defendants, citing 42 U.S.C.A. §602(a)(19)(F), argue that the State is authorized to terminate assistance to those declining work which is "... offered through the public employment offices of the State, or is otherwise offered by an employer...." Brief of Onondaga Defendants at 16-17. This is erroneous because that section authorizes only termination of assistance to those AFDC recipients "certified" to WIN, and then only on the basis of findings by the Secretary of Labor. In addition, the sanctions may not be applied until opportunity for 60 days of counseling has been provided "... aimed at persuading [the recipient] ... to participate in such program...." Since "program" obviously refers to WIN, Congress was creating sanctions exclusive to WIN in §602(a)(19)(F).

Defendants also seek support in a Committee Report relating to the 1961 legislation creating the AFDC-U program. Brief of Onondaga Defendants at 18-19. Whatever was intended at the time, the 1961 legislation must now be viewed in light of Congress' subsequent creation and expansion of WIN: the requirement that every AFDC-U recipient be referred to WIN within 30 days of the grant of assistance [42 U.S.C. §607(b)(2)(A)], and the requirement that recipients of AFDC-U be the first referred and certified to WIN [42 U.S.C.A. §633(a)] indicate beyond doubt that Congress intended AFDC-U work referrals to be accomplished through WIN.

Finally, the Onondaga Defendants seek comfort in the views of the United States Department of Health, Education and Welfare,[25] citing a memorandum of law *amicus curiae* submitted in another lawsuit. Brief of Onondaga Defendants at 20-21. However the views of H.E.W. on the issue of preemption may be construed, the cited memorandum of HEW recognized that state-imposed work rules may constitute additional conditions of eligibility in violation of this Court's holding in *Townsend v. Swank* and *Carleson v. Remillard, supra.* United States Department of Health, Education and Welfare, Memorandum of Law *amicus curiae, Jefferies v. Sugarman,* No. 72-8108 (2nd Cir.) at 4-5.

New York has created an illegal additional condition of eligibility by imposing extensive reporting, work, check pick-up, child-care search and other requirements as conditions of assistance on those otherwise eligible for AFDC. New York uses these conditions to deny AFDC to eligible recipients in violation of the Social Security Act.

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[25] The views of HEW were solicited in this case by the Plaintiffs and the court to no avail. See 348 F. Supp. at 295 n. 8.

CONCLUSION

The judgment of the District Court should be affirmed.

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APPENDIX

United States Constitution, Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C.A. §602(a):

§602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must

* * * * *

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

* * * * *

(19) provide–

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is–

(i) a child who is under age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register, if she so desires, pursuant to this paragraph, and shall be informed of the child care services (if any) which will be available to her in the event she should decide so to register;

(B) that aid under the plan will not be denied by reason of such registration or the individual's certification to the Secretary of Labor under subparagraph (G) of this paragraph, or by reason of an individual's participation on a project under the program established by section 632(b) (2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 10 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title, and income derived from a special work project under the program established by section 632(b)(3) of this title shall be disregarded in

determining the needs of an individual under section 602(a)(7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 632(b)(2) or (3) of this title shall be taken into account;

(E) Repealed. Pub. L. 92-223, §3(a)(5), Dec. 28, 1971, 85 Stat. 804.

(F) that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G)) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment–

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b)(2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor; and

(G) that the State agency will have in effect a special program which (i) will be administered by a separate administrative unit and the employees of which will, to the maximum extent feasible, perform services only in connection with the administration of such program, (ii) will provide (through arrangements with others or otherwise) for individuals who have been registered pursuant to subparagraph (A), in accordance with the order of priority listed in section 633(a) of this title, such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training provided under part C, and will, when arrangements have been made to provide necessary supportive services, including child care, certify to the Secretary of Labor those individuals who are ready for employment or training under part C, (iii) will participate in the development of operational and employability

plans under section 633(b) of this title; and (iv) provides for purposes of clause (ii), that, when more than one kind of child care is available, the mother may choose the type, but she may not refuse to accept child care services if they are available;

42 U.S.C.A. §603:

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to subsection (d)) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958–

* * * * *

(3) in the case of any State, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as found necessary by the Secretary of Health, Education, and Welfare for the proper and efficient administration of the State plan–

(A) 75 per centum of so much of such expenditures as are for–

(i) any of the services described in clauses (14) and (15) of section 602(a) of this title which are provided to any child or relative who is receiving aid under the plan, or to any other individual (living in the same home as such relative and child) whose needs are taken into account in making the determination under clause (7) of such section,

(ii) any of the services described in clauses (14) and (15) of section 602(a) of this title which are provided to any child or relative who is applying for aid to families with dependent children or who, within such period or periods as the Secretary may prescribe, has been or is likely to become an applicant for or recipient of such aid, or

(iii) the training of personnel employed or preparing for employment by the State agency or by the local agency administering the plan in the political subdivision; plus

(B) one-half of the remainder of such expenditures.

* * * * *

(c) Notwithstanding any other provision of this Act, the Federal share of assistance payments under this part shall be reduced with respect to any State for any fiscal year after June 30, 1973, by one percentage point for each percentage point by which the number of individuals certified, under the program of such State established pursuant to section 602(a)(19)(G) of this title, to the local employment office of the State as being ready for employment or training under part C, is less than 15 per centum of the average number of individuals in such State who, during such year, are required to be registered pursuant to section 602(a)(19)(A) of this title.

(d)(1) Notwithstanding subparagraph (A) of subsection (a)(3) the rate specified in such subparagraph shall be 90 per centum (rather than 75 per centum) with respect to social and supportive services provided pursuant to section 602(a)(19)(G) of this title.

(2) Of the sums authorized by section 601 of this title to be appropriated for the fiscal year ending June 30, 1973, not more than $750,000,000 shall be appropriated to the Secretary for payments with respect to services to which paragraph (1) applies.

42 U.S.C.A. §§630 *et seq.*:

§630. Statement of purpose

The purpose of this part is to require the establishment of a program utilizing all available manpower

services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in public service employment, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families.

§631. Authorization of appropriations—Transfer of moneys

(a) There is hereby authorized to be appropriated to the Secretary of Health, Education, and Welfare for each fiscal year a sum sufficient to carry out the purposes of this part. The Secretary of Health, Education, and Welfare shall transfer to the Secretary of Labor from time to time sufficient amounts, out of the moneys appropriated pursuant to this section, to enable him to carry out such purposes.

On-the-job training and public service employment programs; percentage limitation

(b) Of the amounts expended from funds appropriated pursuant to subsection (a) of this section for any fiscal year (commencing with the fiscal year ending June 30, 1973), not less than 33 1/3 per centum thereof shall be expended for carrying out the program of on-the-job training referred to in

section 632(b)(1)(B) of this title and for carrying out the program of public service employment referred to in section 632(b)(3) of this title.

Allotment to States; percentage limitation; formula

(c) Of the sums appropriated pursuant to subsection (a) of this section to carry out the provisions of this part for any fiscal year (commencing with the fiscal year ending June 30, 1973), not less than 50 percent shall be allotted among the States in accordance with a formula under which each State receives (from the total available for such allotment) an amount which bears the same ratio to such total as—

(1) in the case of the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974, the average number of recipients of aid to families with dependent children in such State during the month of January last preceding the commencement of such fiscal year bears to the average number of such recipients during such month in all the States; and

(2) in the case of the fiscal year ending June 30, 1975, or in the case of any fiscal year thereafter, the average number of individuals in such State who, during the month of January last preceding the commencement of such fiscal year, are registered pursuant to section 602(a)(19)(A) of this title bears to the average number of individuals in all States who, during such month, are so registered.

§ 632. Establishment of programs—State and political subdivisions as situs for programs

(a) The Secretary of Labor (hereinafter in this part referred to as the Secretary) shall, in accordance with the provisions of this part, establish work incentive

programs (as provided for in subsection (b) of this section) in each State and in each political subdivision of a State in which he determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established.

Description of programs

(b) Such programs shall include, but shall not be limited to, (1)(A) a program placing as many individuals as is possible in employment, and (B) a program utilizing on-the-job training positions for others, (2) a program of institutional and work experience training for those individuals for whom such training is likely to lead to regular employment, and (3) a program of public service employment for individuals for whom a job in the regular economy cannot be found.

Grants to or agreements with agencies or organizations

(c) In carrying out the purposes of this part the Secretary may make grants to, or enter into agreements with, public or private agencies or organizations (including Indian tribes with respect to Indians on a reservation), except that no such grant or agreement shall be made to or with a private employer for profit or with a private nonprofit employer not organized for a public purpose for purposes of the work experience program established by clause (2) of subsection (b) of this section.

Use of authorities for providing manpower training and employment services and opportunities;

use of funds; reimbursement of agencies for services

(d) In providing the manpower training and employment services and opportunities required by this part, the Secretary of Labor shall, to the maximum extent feasible, assure that such services and opportunities are provided by using all authority available to him under this chapter or any other Act. In order to assure that the services and opportunities so required are provided, the Secretary of Labor shall use the funds appropriated to him under this part to provide programs required by this part through such other Act, to the same extent and under the same conditions (except as regards the Federal matching percentage) as if appropriated under such other Act and, in making use of the programs of other Federal, State, or local agencies (public or private), the Secretary of Labor may reimburse such agencies for services rendered to persons under this part to the extent such services and opportunities are not otherwise available on a nonreimbursable basis.

Prohibition against reduction of other statutory manpower services

(e) The Secretary shall take appropriate steps to assure that the present level of manpower services available under the authority of other statutes to recipients of aid to families with dependent children is not reduced as a result of programs under this part.

Labor Market Advisory Council; establishment for appropriate geographic area; functions; representation of area interests; institutional training

(f) (1) The Secretary of Labor shall establish in each State, municipality, or other appropriate geographic area with a significant number of persons

registered pursuant to section 602(a)(19)(A) of this title a Labor Market Advisory Council the function of which will be to identify and advise the Secretary of the types of jobs available or likely to become available in the area served by the Council; except that if there is already located in any area an appropriate body to perform such function, the Secretary may designate such body as the Labor Market Advisory Council for such area.

(2) Any such Council shall include representatives of industry, labor, and public service employers from the area to be served by the Council.

(3) The Secretary shall not conduct, in any area, institutional training under any program established pursuant to subsection (b) of this section of any type which is not related to jobs of the type which are or are likely to become available in such area as determined by the Secretary after taking into account information provided by the Labor Market Advisory Council for such area.

§633. Operation of program

(a) The Secretary shall provide a program of testing and counseling for all persons certified to him by a State, pursuant to section 602(a)(19)(G) of this title, and shall select those persons whom he finds suitable for the programs established by clauses (1) and (2) of section 632(b) of this title. Those not so selected shall be deemed suitable for the program established by clause (3) of such section 632(b) of this title unless the Secretary finds that there is good cause for an individual not to participate in such program. The Secretary, in carrying out such program for individuals certified to him under section 602(a)(19)(G) of this title, shall accord priority to such individuals in the following order, taking into account employability potential: first, unemployed fathers; second, mothers

whether or not required to register pursuant to section 602(a)(19)(A) of this title, who volunteer for participation under a work incentive program; third, other mothers, and pregnant women, registered pursuant to section 602(a)(19)(A) of this title, who are under 19 years of age; fourth, dependent children and relatives who have attained age 16 and who are not in school or engaged in work or manpower training; and fifth, all other individuals so certified to him.

(b)(1) For each State the Secretary shall develop jointly with the administrative unit of such State administering the special program referred to in section 602(a)(19)(G) of this title a statewide operational plan.

(2) The statewide operational plan shall prescribe how the work incentive program established by this part will be operated at the local level, and shall indicate (i) for each area within the State the number and type of positions which will be provided for training, for on-the-job training, and for public service employment, (ii) the manner in which information provided by the Labor Market Advisory Council (established pursuant to section 632(f) of this title) for any such area will be utilized in the operation of such program, and (iii) the particular State agency or administrative unit thereof which will be responsible for each of the various activities and functions to be performed under such program. Any such operational plan for any State must be approved by the Secretary, the administrative unit of such State administering the special program referred to in section 602(a)(19)(G) of this title, and the regional joint committee (established pursuant to section 639 of this title) for the area in which such State is located.

(3) The Secretary shall develop an employability plan for each suitable person certified to him pursuant to section 602(a)(19)(G) of this title which shall

describe the education, training, work experience, and orientation which it is determined that such person needs to complete in order to enable him to become self-supporting.

(c) The Secretary shall make maximum use of services available from other Federal and State agencies and, to the extent not otherwise available on a nonreimbursable basis, he may reimburse such agencies for services rendered to persons under this part.

(d) To the extent practicable and where necessary, work incentive programs established by this part shall include, in addition to the regular counseling, testing, and referral available through the Federal-State Employment Service System, program orientation, basic education, training in communications and employability skills, work experience, institutional training, on-the-job training, job development, and special job placement and followup services, required to assist participants in securing and retaining employment and securing possibilities for advancement.

(e)(1) In order to develop public service employment under the program established by section 632(b)(3) of this title, the Secretary shall enter into agreements with (A) public agencies, (B) private nonprofit organizations established to serve a public purpose, and (C) Indian tribes with respect to Indians on a reservation, under which individuals deemed suitable for participation in such a program will be provided work which serves a useful public purpose and which would not otherwise be performed by regular employees.

(2) Such agreements shall provide–

(A) for the payment by the Secretary to each employer, with respect to public service employment performed by any individual for such employer, of an amount not exceeding 100 percent of the cost of providing such employment to such individual during the first year of such employment,

an amount not exceeding 75 percent of the cost of providing such employment to such individual during the second year of such employment, and an amount not exceeding 50 percent of the cost of providing such employment to such individual during the third year of such employment;

(B) the hourly wage rate and the number of hours per week individuals will be scheduled to work in public service employment for such employer;

(C) that the Secretary will have such access to the premises of the employer as he finds necessary to determine whether such employer is carrying out his obligations under the agreement and this part; and

(3) Repealed. Pub. L. 92-223, §3(b)(4)(c)(iv), Dec. 28, 1971, 85 Stat. 807.

(4) No wage rates provided under any agreement entered into under this subsection shall be lower than the applicable minimum wage for the particular work concerned.

(D) that the Secretary may terminate any agreement under this subsection at any time.

(f) Before entering into a project under section 632(b)(3) of this title, the Secretary shall have reasonable assurances that–

(1) appropriate standards for the health, safety, and other conditions applicable to the performance of work and training on such project are established and will be maintained,

(2) such project will not result in the displacement of employed workers,

(3) with respect to such project the conditions of work, training, education, and employment are reasonable in the light of such factors as the type of work, geographical region, and proficiency of the participant,

(4) appropriate workmen's compensation protection is provided to all participants.

(g) Where an individual, certified to the Secretary of Labor pursuant to section 602(a)(19)(G) of this title refuses without good cause to accept employment or participate in a project under a program established by this part, the Secretary of Labor shall (after providing opportunity for fair hearing) notify the State agency which certified such individual and submit such other information as he may have with respect to such refusal.

(h) With respect to individuals who are participants in public service employment under the program established by section 632(b)(3) of this title, the Secretary shall periodically (but at least once every six months) review the employment record of each such individual while on such special work project and on the basis of such record and such other information as he may acquire determine whether it would be feasible to place such individual in regular employment or on any of the projects under the programs established by section 632(b)(1) and (2) of this title.

§634. Incentive payments and allowances for transportation and other costs

(a) The Secretary is authorized to pay to any participant under a program established by section 632(b)(2) of this title an incentive payment of not more than $30 per month, payable in such amounts and at such times as the Secretary prescribes.

(b) The Secretary of Labor is also authorized to pay, to any member of a family participating in manpower training under this part, allowances for transportation and other costs incurred by such member, to the extent such costs are necessary to and directly related to the participation by such member in such training.

§635. Federal assistance

(a) Federal assistance under this part shall not exceed 90 per centum of the costs of carrying out this part. Non-Federal contributions may be cash or in kind, fairly evaluated, including but not limited to plant, equipment, and services.

(b) Costs of carrying out this part include costs of training, supervision, materials, administration, incentive programs, transportation, and other items as are authorized by the Secretary, but may not include any reimbursement for time spent by participants in work, training, or other participation in the program.

§636. Period of enrollment

(a) The program established by section 632(b)(2) of this title shall be designed by the Secretary so that the average period of enrollment under all projects under such program throughout any area of the United States will not exceed one year.

(b) Services provided under this part may continue to be provided to an individual for such period as the Secretary determines (in accordance with regulations prescribed jointly by him and the Secretary of Health, Education, and Welfare) is necessary to qualify him fully for employment even though his earnings disqualify him from aid under a State plan approved under section 602 of this title.

§637. Relocation of participants

The Secretary may assist participants to relocate their place of residence when he determines such relocation is necessary in order to enable them to become permanently employable and self-supporting. Such assistance shall be given only to participants who concur in their relocation and who will be employed at

their place of relocation at wage rates which will meet at least their full need as determined by the State to which they will be relocated. Assistance under this section shall not exceed the reasonable costs of transportation for participants, their dependents, and their household belongings plus such relocation allowance as the Secretary determines to be reasonable.

§638. Participants not Federal employees

Participants in programs established by this part shall be deemed not to be Federal employees and shall not be subject to the provisions of laws relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

§639. Rules and regulations

The Secretary and the Secretary of Health, Education, and Welfare shall, not later than July 1, 1972, issue regulations to carry out the purposes of this part. Such regulations shall provide for the establishment, jointly by the Secretary and the Secretary of Health, Education, and Welfare, of (1) a national coordination committee the duty of which shall be to establish uniform reporting and similar requirements for the administration of this part, and (2) a regional coordination committee for each region which shall be responsible for review and approval of statewide operational plans developed pursuant to section 633(b) of this title.

§641. Evaluation and research

The Secretary shall (jointly with the Secretary of Health, Education, and Welfare) provide for the continuing evaluation of the work incentive programs

established by this part, including their effectiveness in achieving stated goals and their impact on other related programs. He also may conduct research regarding ways to increase the effectiveness of such programs. He may, for this purpose, contract for independent evaluations of and research regarding such programs or individual projects under such programs. For purposes of sections 635 and 643 of this title, the costs of carrying out this section shall not be regarded as costs of carrying out work incentive programs established by this part. Nothing in this section shall be construed as authorizing the Secretary to enter into any contract with any organization after June 1, 1970, for the dissemination by such organization of information about programs authorized to be carried on under this part.

N.Y. Soc. Serv. L. §131(4):

4. No assistance or care shall be given to an employable person who has not registered with the nearest local employment agency of the department of labor or has refused to accept employment in which he is able to engage.

A person shall be deemed to have refused to accept such employment if he:

a. fails to obtain and file with the social services district at least semi-monthly a new certificate from the appropriate local employment office of the state department of labor stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent employment in which the applicant is able to engage, or

b. willfully fails to report for an interview at an employment office with respect to employment when requested to do so by such office, or

c. willfully fails to report to such office the result of a referral to employment, or

d. willfully fails to report for employment. Such willful failures or refusal as above listed shall be reported immediately to the social services district by such employment office.

For the purposes of this subdivision and subdivision five, a person receiving or applying for home relief shall be deemed employable if such person is not rendered unable to work by: illness or significant and substantial incapacitation, either mental or physical, to the extent and of such duration that such illness or incapacitation prevents such person from performing services; advanced age; full-time attendance at school in the case of a minor, in accordance with provisions of this chapter; full-time, satisfactory participation in an approved program of vocational training or rehabilitation; the need of such person to provide full-time care for other members of such person's household who are wholly incapacitated, or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the appropriate social services department to obtain others to provide such care. A person assigned to and participating in a public works project under the provisions of section one hundred sixty-four or three hundred fifty-k of this chapter shall be deemed to be employable but not employed. For the purposes of this subdivision and subdivision five, a person receiving or applying for aid to dependent children shall be deemed employable in accordance with the provisions of section three hundred fifty-e of this chapter, except that a mother who is unable to work by her need to provide full-time care for her children, and for whom required care is not otherwise reasonably available notwithstanding diligent efforts by such mother and the appropriate social services department to provide such care shall not be deemed employable.

Every employable recipient of public assistance who is not engaged in regular full-time employment shall receive his public assistance grants and allowances in person from the division of employment of the state department of labor, in accordance with regulations of the department.

Notwithstanding section three hundred fifty-e or any other provisions of this chapter, the provisions of this subdivision shall apply to applicants for or recipients of aid to dependent children until such time as they are enrolled and participating in the Work Incentive Program.

Such regulations may provide for including the full amount of any shelter allowance in one of the semi-monthly grants and allowances made to such an employable recipient of public assistance.

N.Y. Soc. Serv. L. §350-e:

§350-e. Registration and certification; work incentive programs

1. In accordance with federal requirements and this title and the regulations of the department, every individual, as a condition of eligibility for aid under this title, shall register for manpower services training and employment with the state department of labor or other appropriate agency under the work incentive program unless such individual is:

(a) a person who is ill, incapacitated or of advanced age;

(b) a person who resides so far from any of the projects under the work incentive programs that he cannot effectively participate under any of such programs;

(c) a child or minor attending school full time;

(d) a person whose presence in the home is required because of the illness or incapacity of another member of the household;

(e) a mother or other relative of a child under the age of six who is caring for the child, provided that such person shall be advised of her option to register if she so desires and shall be informed of the child care services which will be available to her in the event she should decide so to register; or

(f) the mother or other female caretaker of a child, if the father or another adult male relative is in the home, is employable, and is in full compliance with all of the registration, training and employment requirements of this section.

2. A social services district shall, if and as long as federal aid is available therefor, provide such social and supportive services, in accordance with regulations of the department, as are necessary to enable employable individuals to accept employment or receive manpower training under this subdivision and shall, when such services including child care had been made available, certify to the department of labor those individuals who are ready for employment or training under the work incentive program in accordance with an order of priority established by federal requirements. Such certifications of fathers of dependent children who are eligible for aid to dependent children in accordance with the provisions of paragraph one-a of subdivision B of section three hundred forty-nine, shall be made within thirty days after receipt of aid with respect to such children. When more than one kind of child care is available, a mother who has registered may choose the type, but may not refuse to accept child care services.